No. 14-510

# In the Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS


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## QUESTION PRESENTED

Whether the court of appeals misapplied this Court's decision in *Holland* v. *Florida*, 560 U.S. 631 (2010), when it ruled that petitioner was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Education Assistance Act (25 U.S.C. 450 *et seq.*) claims under the Contract Disputes Act of 1978 (41 U.S.C. 7101 *et seq.*).

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## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 764 F.3d 51. The opinion of the district court (Pet. App. 20a-43a) is reported at 841 F. Supp. 2d 99.

### JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The petition for a writ of certiorari was filed on November 3, 2014, and was granted on June 30, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-23a.

## STATEMENT

Petitioner, Menominee Indian Tribe of Wisconsin (the Tribe), is a federally-recognized Indian tribe. Pet. App. 21a. For the years 1996 through 1998, the Tribe entered into contracts with the Indian Health Service (IHS), an agency of the Department of Health and Human Services (HHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 450 *et seq.*), to provide federally-funded health-care services to members of the Tribe and other eligible beneficiaries. See Pet. App. 22a.

The Tribe raised no issue respecting the government's payments pursuant to these ISDA contracts until September 7, 2005, when it filed claims pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, for additional contract-support-costs funding. See Compl. ¶ 8; Pet. App. 8a, 47a, 70a n.2. Those claims were filed after the expiration of the CDA's six-year period for presenting such claims. 41 U.S.C. 7103(a)(4).

The question in this case is whether the Tribe demonstrated that it pursued its contract-support-costs claims diligently and that some extraordinary circumstance prevented timely filing of those claims, such that the CDA's six-year limitations period should have been equitably tolled for the duration of the Tribe's delay.

1. a. Congress enacted ISDA in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration"

of federal programs, functions, services, and activities for Indians. § 3(b), 88 Stat. 2204; 25 U.S.C. 450a(b). Until that time, the federal government itself generally administered federal programs for Indians. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987) (Senate Report). Under ISDA, tribes may elect to enter into "[s]elf-determination contracts" with the Secretary of the Interior (Interior) or the Secretary of HHS, as appropriate, to assume operation of such federally-funded programs. 25 U.S.C. 450f.[1]

A tribe is eligible to receive ISDA contract funding equal to the funding that the relevant Secretary would have otherwise expended—also known as the "Secretarial amount"—to operate the particular contracted programs during the year in question. J.A. 119-120 (Fisher Decl. ¶ 9); see 25 U.S.C. 450j(c)(2), 450j-1(a)(1), 450*l*(c) (model agreement § 1(b)(4) and (f)(2)). ISDA also requires the government to award additional funding, above the Secretarial amount, to reimburse a tribe for reasonable "contract support costs" it incurred. 25 U.S.C. 450j-1(a)(2). Funding for contract support costs covers activities of the tribe that are necessary to ensure contract compliance and prudent management and that are normally not carried on by Bureau of Indian Affairs (BIA) or IHS in its direct operation of the programs. 25 U.S.C. 450j-

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[1] Tribes contract with HHS to operate healthcare programs, functions, services, and activities under ISDA. § 104(b), 88 Stat. 2208. Tribes contract with Interior to administer a wide range of federal programs and services for Indians, including social services, natural resources protection, public safety services such as police and fire preparedness, and elementary and secondary education. § 104(a), 88 Stat. 2207-2208.

1(a)(2) and (3).[2] Those costs may vary from year to year, and the sums to be provided are negotiated in annual funding agreements. Pet. App. 22a-23a; see 25 U.S.C. 450j(c)(2), 450j-1(a)(3)(B).

b. Congress amended ISDA in 1988 to apply the CDA to contract disputes arising under ISDA. See 25 U.S.C. 450m-1(d) (the CDA "shall apply to self-determination contracts"). See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 206, 102 Stat. 2295. The CDA governs all contract disputes between government contractors and the United States and establishes a mandatory administrative process for resolving such disputes. See 41 U.S.C. 7102(a).[3]

The CDA includes a mandatory presentment requirement. A contractor must submit "[e]ach claim" it may have against the government to a contracting officer for a decision on the claim. 41 U.S.C. 7103(a)(1) and (2); see 25 C.F.R. 900.215-900.230.[4] A

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[2] Contract support costs may be categorized as either direct or indirect. Indirect contract support costs may be determined, in part, using an indirect cost rate agreement, subject to adjustments to avoid duplication of funding provided in the Secretarial amount. See 25 U.S.C. 450j-1(a)(2)(A), (B) and (3); see *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1376 (Fed. Cir. 1999) (indirect cost rate determined by negotiations with Interior's Office of the Inspector General), cert. denied, 530 U.S. 1203 (2000); see also *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635 (2005) (describing use of an "indirect cost rate").

[3] This brief, like the court of appeals' decision (see Pet. App. 3a n.1), primarily cites to the current codification of the CDA rather than its prior codification at 41 U.S.C. 601 *et seq.* (2006).

[4] Some courts, by way of shorthand, refer to the requirement that a contractor present a claim to the contracting officer as an

CDA claim "need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision." Pet. App. 4a; see 25 C.F.R. 900.218 (defining a CDA claim as a "written demand by one of the contracting parties" seeking "[p]ayment of a specific sum of money under the contract," "[a]djustment or interpretation of contract terms," or "[a]ny other claim relating to the contract").

In 1994, Congress amended the CDA by adding a statute of limitations for presentment of a claim to the contracting officer, providing that "[e]ach claim by a contractor * * * shall be submitted within 6 years after the accrual of the claim." Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (41 U.S.C. 7103(a)(4)(A)). That six-year deadline applies to claims arising from contracts awarded on or after October 1, 1995. *Id.* § 10001(b)(3), 108 Stat. 3404; 48 C.F.R. 33.206(a).

As a general matter under the CDA, "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review[,] * * * unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. 7103(g). A contractor may challenge a contracting officer's decision by taking an administrative appeal to a board of contract appeals or by instituting an action for breach of contract in the

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"exhaustion" requirement. As explained below, however, although the CDA requires a contractor to present its claim to a contracting officer, it does not require a contractor to fully exhaust available administrative remedies by thereafter pursuing an optional administrative appeal to a board of contract appeals. See 41 U.S.C. 7104; see also, *e.g.*, *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1107 (D.N.M. 2006); pp. 5-6, *infra*.

Court of Federal Claims (CFC). 41 U.S.C. 7104(a) and (b)(1), 7105(b). Review may then proceed to the Court of Appeals for the Federal Circuit from the decision of the agency appeals board (in this case, the Interior Board of Contract Appeals (IBCA), which is now the Civilian Board of Contract Appeals), or of the CFC. 28 U.S.C. 1295(a)(3); 41 U.S.C. 7107(a)(1); see 25 U.S.C. 450m-1(d).

ISDA also provides that a tribe may challenge a contracting officer's decision through an action in federal district court. The district court's jurisdiction over a claim for money damages in such an action is "subject to the provisions of [the CDA] and concurrent with the [CFC]." 25 U.S.C. 450m-1(a) (subjecting district court jurisdiction to subsection (d)); 25 U.S.C. 450m-1(d) (CDA "shall apply" to self-determination contracts). An appeal of the district court's decision may then be taken to the appropriate circuit court of appeals. 28 U.S.C. 1291.

2. The payment of contract support costs under ISDA self-determination contracts has been the subject of substantial litigation. Tribes have advanced a variety of claims that challenge the government's compliance with particular contract terms, or that dispute whether the government has paid the full amount of contract support costs that ISDA requires.[5]

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[5] In the predominant category of claims, described as "shortfall" claims, tribes have sought the difference between what they claimed were full contract support costs owed under ISDA and the agreed-upon amount for such costs in the tribe's contract. See, *e.g.*, *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 440-441 (D.N.M. 2007). In some instances, tribes also have alleged that the government promised an additional amount in the annual funding agreement that had not been paid. See, *e.g.*, *Cherokee Nation*, 543 U.S. at 635-636. The government did not pay those additional

In addition, beginning in fiscal year 1994, Congress imposed statutory caps on the total appropriations available for contract-support-cost payments under ISDA and applied such caps to IHS contracts from 1998 onward. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, Tit. II, 111 Stat. 1583; U.S. Br. at 8, *Salazar* v. *Ramah Navajo Chapter*, No. 11-551 (Feb. 17, 2012) (listing appropriation caps). That action by Congress generated further litigation challenging the impact of those caps on the government's obligation to pay the "'full amount' of 'contract support costs' incurred by tribes in performing their contracts." See, *e.g.*, *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012) (quoting 25 U.S.C. 450j-1(a)(2) and (g)); *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635-637 (2005).

3. In this case, the Tribe signed "Annual Funding Agreements" with IHS for the years 1996 through 1998 which specifically identify the ISDA contract funding for each year, including funding for contract support costs. Pet. App. 22a. On May 26, 1999, the

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amounts in years 1998-2013 because insufficient appropriations by Congress were available to the agency to pay all of its obligations, including the obligation to fully fund contract support costs. *Ibid.* Another category of claims, called "rate miscalculation" or "rate dilution" claims, has involved challenges to the formula used by Interior to calculate tribes' indirect cost rates, with allegations that the rate should be adjusted upward to account for other funding sources that did not pay indirect costs. See, *e.g.*, *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1459, 1463 (10th Cir. 1997) (describing miscalculation theory). In negotiating indirect contract support costs with tribes, IHS utilizes the rate calculated by Interior. See 25 U.S.C. 450b(g); *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054, 1058 (10th Cir. 2011).

Tribe's Administrator executed a contract release form for the 1996-1998 contracts, that fully released all claims without reservation or exception.[6] J.A. 127 (Fisher Decl. ¶ 29), 240-242 (contract release). On September 7, 2005, however, the Tribe filed claims pursuant to the CDA, seeking additional funding for contract support costs. See Compl. ¶ 8; Pet. App. 8a, 47a, 70a n.2. Those claims were filed after the expiration of the CDA's six-year period for presentment of a claim for each of the three years. 41 U.S.C. 7103(a)(4).

The Tribe now alleges that it failed to timely file those claims because it reasonably relied on two other federal suits that challenged certain aspects of the payment of contract-support-costs funding to tribes: a nationwide class action filed by the Ramah Navajo Chapter, and a lawsuit filed by the Cherokee Nation and Shoshone Paiute Tribes.

a. In 1990, the Ramah Navajo Chapter filed a class action in the District Court for the District of New Mexico, alleging that BIA underpaid indirect contract support costs under its ISDA contracts by applying miscalculated indirect cost rates. *Ramah Navajo*

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[6] When the term of each annual funding agreement expires, the Area Office for the IHS Bemidji Area, in which the Tribe is located, provides tribal contractors with a contract release form, which states the total amount of funding awarded under the contract and provides space for the contractor to state any exceptions for claims that it does not release. J.A. 126 (Fisher Decl. ¶ 27); see J.A. 240-242 (contract release). The IHS Bemidji Area Chief Contracting Officer, William Fisher, testified that many tribal contractors decline, without penalty, to execute the release form. J.A. 126-127 (Fisher Decl. ¶ 28). He further stated that IHS would continue to negotiate with such a tribe for future contracts. *Ibid.* Indeed, ISDA would not permit IHS to decline to contract with a tribe on that ground. 25 U.S.C. 450f(a)(2).

*Chapter* v. *Lujan*, No. 90-cv-957 (D.N.M. Oct. 1, 1993); see J.A. 35.

Central to the Tribe's current argument for equitable tolling is its purported reliance on an unpublished memorandum opinion, issued by the district court in *Ramah* in 1993, certifying a class over the government's objection to the inclusion of tribes that failed to present their claims to the BIA contracting officer, as required by the CDA. J.A. 36-39 (*Ramah* Memorandum Opinion). The district court in *Ramah* agreed with the government that presentment (which the court referred to as "exhaustion") is normally a "jurisdictional prerequisite" to suit under the CDA. But the court decided that presentment was not required in *Ramah* because the suit "d[id] not concern a typical contract dispute wherein issues of performance need be addressed," but rather challenged "the [BIA's] policies and practices" and sought "to make systemwide reforms." J.A. 38-39.

In 1997, the Tenth Circuit recognized the validity of the *Ramah* class's allegation that BIA used an improper rate calculation to determine contract support costs. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455. Following the remand from the Tenth Circuit's decision, the district court, in 1999, approved a partial settlement of claims for the years 1989 to 1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091, 1095, 1103 (D.N.M.). As a class member, the Tribe received nearly $800,000. Pet. App. 6a. In 2002, the Tribe benefitted from a second partial class settlement involving subsequently-added contract-support-costs claims. See *Ramah Navajo Chapter* v.

*Norton*, 250 F. Supp. 2d 1303, 1305-1306, 1316 (D.N.M.) (approving second partial settlement).[7]

b. On March 5, 1999, the Cherokee Nation and Shoshone Paiute Tribes filed suit and sought certification of a putative class that included "Indian tribes and tribal organizations operating [IHS] programs under [ISDA] contracts * * * that were not fully paid their contract support costs needs" between 1988 and 2000. *Cherokee Nation* v. *United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001); see *Cherokee Nation* v. *HHS*, No. 99-cv-92 (E.D. Okla.). The Tribe now asserts (Br. 34-38) that it relied on its supposed membership in the *Cherokee Nation* putative class to represent its interests, rather than submit its own contract-support-costs claims to IHS.

On February 9, 2001, however, the district court denied class certification in *Cherokee Nation*, finding that, because the individually-negotiated tribal contracts lacked "standard language" defining "'full' contract support costs," the class lacked commonality and typicality under Rule 23 of the Federal Rules of Civil Procedure. 199 F.R.D. at 363-365. The court also found that the class suffered from conflicts of interest because tribes were competing for a finite

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[7] Other aspects of the *Ramah* litigation continued. In 2012, this Court held the government liable for "the full amount of 'contract support costs' incurred by tribes in performing their contracts," notwithstanding the express statutory caps imposed by Congress on the total funds available to BIA to pay such costs. See *Ramah*, 132 S. Ct. at 2186, 2191-2195. In September 2015, the parties sought preliminary approval of a final settlement agreement in *Ramah*. See *Ramah Navajo Chapter* v. *Jewell*, No. 90-cv-957, (D.N.M. Sept. 16, 2015) (Doc. 1306).

pool of government funds. *Id.* at 365-366.[8] Following the denial of class certification, the *Cherokee Nation* case proceeded only on the claims of the named plaintiffs, and the district court subsequently denied those claims on the merits. *Cherokee Nation* v. *United States*, 190 F. Supp. 2d 1248, 1259-1261 (E.D. Okla. 2001). The plaintiffs appealed the district court's merits decision, but not the denial of class certification, and the Tenth Circuit affirmed. *Cherokee Nation* v. *Thompson*, 311 F.3d 1054, 1060, 1063-1065 (2002). Also in 2002, the Ninth Circuit denied another tribe's similar contract-support-costs claims. See *Shoshone-Bannock Tribes of Fort Hall Reservation* v. *Secretary, Dep't of Health & Human Servs.*, 279 F.3d 660, 663.

c. Meanwhile, the Cherokee Nation pursued similar contract-support-costs claims against IHS in an administrative appeal to the IBCA, which ruled in Cherokee Nation's favor. See *Appeals of Cherokee Nation*, No. 3877, 1999 WL 440045 (IBCA June 30, 1999) (holding tribe entitled to "full payment of its [contract support costs]" for work already performed), aff'd on reconsideration, *Appeals of Cherokee Nation*, No. 4000/98, 2001 WL 283245 (IBCA Mar. 21, 2001). The Federal Circuit affirmed, holding that the government was required to "reprogram" funds from other sources to pay tribes' "full contract support

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[8] The district court in *Cherokee Nation* rejected the plaintiffs' contention that the certification of the class in *Ramah* provided precedent supporting class certification, noting that in *Ramah* the government had opposed certification because the class included tribes that had not presented their claims to BIA and that the court in *Ramah* had failed to consider the requirements of Rule 23. 199 F.R.D. at 366 n.1.

costs." *Thompson* v. *Cherokee Nation*, 334 F.3d 1075, 1079, 1088 (2003).

d. This Court granted certiorari in *Cherokee Nation* to resolve the circuit split among the Ninth, Tenth, and Federal Circuits on the issues raised regarding the government's liability for contract support costs. *Cherokee Nation*, 543 U.S. at 635-636. In March 2005, this Court affirmed the decision of the Federal Circuit, holding that the government was liable for the full amount of the tribes' contract support costs for fiscal years 1994 through 1997. *Id.* at 634, 636.[9]

4. It was only after this Court's *Cherokee Nation* decision—and after the CDA's six-year limitations period had expired—that the Tribe filed its own claims with the IHS contracting officer that it should have been paid a greater amount for contract support costs for the years 1996, 1997, and 1998.[10] Pet. App. 8a. Each claim consisted of a brief letter from the Tribe to the contracting officer (Claim Letters) and

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[9] On September 10, 2001, a third putative class action (the second against IHS) was filed in the District of New Mexico, this time alleging that contract support costs were improperly calculated. *Zuni*, 467 F. Supp. 2d at 1104-1105. In December 2001, the district court stayed that action pending the appellate proceedings in *Cherokee Nation*. *Id.* at 1106-1114. On October 11, 2006, the court in *Zuni* dismissed the non-presented claims for contract support costs, and in May 2007, the court denied class certification because of the existence of non-presented claims within the putative class. 243 F.R.D. at 442-443.

[10] Because the contract claims accrued by no later than the end of December of each calendar-year contract, the statute of limitations expired for the 1996, 1997, and 1998 contracts by the end of December in the years 2002, 2003, and 2004, respectively. See Pet. App. 70a n.1.

alleged that the Tribe was owed additional funding.[11] In particular, the Claim Letters asserted that for each of those years: (1) IHS owed the Tribe a specified dollar-amount of "shortfall," because "IHS paid [the Tribe] less than its full [contract support costs]" and should have "reprogrammed funds * * * to pay tribes the full [contract support costs] due under their contracts," and (2) applying the rationale of the Tenth Circuit's 1997 decision in *Ramah*, 112 F.3d 1455, IHS had "miscalculated the amount of indirect costs * * * due" under its annual funding agreements. Lodged Materials 2, 5, 8.

On May 1, 2006, the contracting officer issued decisions denying each of the Tribe's claims. Lodged Materials 11-33; Compl. ¶ 9. The contracting officer first denied each claim as untimely because it was filed more than six years after it accrued, and thus was barred by the CDA's statute of limitations, 41 U.S.C. 7103(a)(4). See Lodged Materials 15-16, 21-22, 31-33. In the alternative, the contracting officer denied each of the Tribe's claims on the merits, determining that IHS had, in fact, paid the amounts agreed upon in the annual funding agreements and that no additional payment was due.[12] *Id.* at 14-15, 22-23, 29-

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[11] Copies of the Claim Letters for 1996 through 1998, and the IHS contracting officer's decisions denying those claims, have been lodged with the Clerk of this Court pursuant to Supreme Court Rule 32.3 and have been consecutively paginated. This brief cites to the Lodged Materials according to that pagination.

[12] The decisions of the contracting officer explained that the agency's accounting records reflected payments to the Tribe in the exact amount owed under each of the contract's Annual Funding Agreements. The contracting officer also found no basis for IHS to adjust the indirect cost rate that the Tribe negotiated with Interior and insufficient information to show any flaw in Interior's

31. The contracting officer further found that IHS could rely on the Tribe's unconditional execution of the contracts and the contract release. See *id.* at 15, 22, 30. Under these circumstances, the contracting officer found the Tribe was "barred from seeking retroactive adjustment of the [c]ontract terms at this time." *Ibid.*

5. a. The Tribe sought judicial review of the contracting officer's decision in the District Court for the District of Columbia. The Tribe did not dispute that its claims for the years 1996 through 1998 were untimely, but it argued that the limitations period was subject to either class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), or equitable tolling. The district court initially dismissed the suit on the ground that the six-year limitations period was jurisdictional and therefore did not permit tolling. Pet. App. 70a-71a & n.2 (*Menominee I*).

The D.C. Circuit reversed in part and remanded. Pet. App. 44a-68a (*Menominee II*). The court of appeals concluded that the CDA's six-year limitations period for filing a claim with a contracting officer is not jurisdictional, *id.* at 49a-55a, and did not necessarily preclude either class-action tolling or equitable tolling. See *id.* at 55a-65a. The court nonetheless held

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methodology for calculating that rate. See Lodged Materials 15-16, 22-23, 31-33. The contracting officer further explained that, in response to the Tenth Circuit's decision in *Ramah*, 112 F.3d 1455, Congress had amended ISDA to prohibit the Tribe's claimed adjustment with regard to IHS-funded contracts. See *ibid.*; see also 25 U.S.C. 450j-2. Because the parties have been litigating the issue of whether the Tribe's claims are time-barred, the question of liability under the contracts and the ISDA remains a matter of dispute.

that the Tribe was not entitled to class-action tolling during the pendency of the class-certification motion in *Cherokee Nation* because its failure to file a CDA claim with IHS rendered the Tribe "ineligible to participate in the class action at the time class certification [was] denied." *Id.* at 57a-58a. The court of appeals remanded to the district court to resolve the Tribe's contention that the six-year limitations period for filing a claim should nonetheless be equitably tolled. *Id.* at 65a.

b. On remand, the district court found equitable tolling unwarranted and entered summary judgment for the government. Pet. App. 28a-37a (*Menominee III*). Quoting this Court's decision in *Holland* v. *Florida*, 560 U.S. 631, 649 (2010), the court explained that "a litigant must establish two things for equitable tolling to apply: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" Pet. App. 28a.

The district court concluded that the Tribe's asserted reasons for failing to file a timely claim "do not, individually or collectively, amount to 'an extraordinary circumstance'" that could warrant tolling. Pet. App. 34a. The court observed that the Tribe admitted that it was "aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*." *Id.* at 33a (citing *id.* at 100a ¶ 8 (Wakau Decl. ¶ 8)). The court noted that although "filing an administrative claim is a relatively simple process," the Tribe could not "point to any affirmative act it took in over six years to pursue its claim diligently." *Id.* at 37a.

c. The D.C. Circuit affirmed.[13] Pet. App. 1a-19a (*Menominee IV*). The court of appeals agreed with the district court that the Tribe failed to establish any "extraordinary circumstance" warranting tolling. *Id.* at 2a (quoting *Holland*, 560 U.S. at 649). It explained that, "[t]o count as sufficiently 'extraordinary' to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control," *id.* at 10a, and "cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation," *id.* at 11a. Here, the court reasoned, the "Tribe faced no extraordinary circumstances" "because the obstacles the Tribe confronted were ultimately of its own making." *Id.* at 12a.

The court of appeals specifically rejected the Tribe's three arguments for equitable tolling. Pet. App. 2a, 12a-19a. First, the court rejected the Tribe's reliance on its (mistaken) expectation that it would "be a member of the *Cherokee Nation* [putative] class." *Id.* at 13a; see *id.* at 6a. "The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* [putative] class," and its apparent "belief that it could participate in the *Cherokee Nation* [putative] class without exhausting its administrative remedies was unjustified." *Id.* at 13a-14a. That "miscalculation," the court explained, was not an extraordinary circumstance beyond the Tribe's control. *Id.* at 14a.

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[13] At the Tribe's request, the D.C. Circuit at first held the appeal in abeyance pending the Federal Circuit's resolution of a similar equitable-tolling contention by another tribal entity in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA II*). 9/28/2012 Order.

Second, the court of appeals rejected the Tribe's contention that the "certainty of failure * * * in bringing its claims * * * stood in its way." Pet. App. 15a. The court explained that "[a] party is not excused from timely filing its claim because the agency's view of the law might be inhospitable." *Ibid.* To the contrary, "[t]he federal courts, not contracting officers, are the final word on federal law," and it was therefore "incumbent upon [the Tribe] to test [its] right and remedy in the available forums." *Id.* at 15a-16a. Given that the "procedure for exhausting administrative remedies is simple," the court added, "[w]hat stood between the Tribe and class-action tolling [as a putative class member in *Cherokee Nation*] was little more than an envelope and a stamp." *Id.* at 17a.

Finally, the court of appeals rejected petitioner's argument that equitable tolling was warranted because of the "breadth and complexity" of the contract-support-costs litigation, observing that, "[i]f a lawsuit's 'breadth and complexity' were an 'extraordinary circumstance,' few statutes of limitations would function." Pet. App. 18a-19a (citation omitted). Accordingly, the court concluded that "none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims," nor did the circumstances, when viewed together, "jointly amount[] to an 'extraordinary' obstacle."[14] *Id.* at 18a. The court therefore found equitable tolling was unwarranted. *Id.* at 19a.

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[14] Because the court of appeals held that the Tribe failed to identify any "extraordinary circumstances" that prevented it from timely filing a claim, the court did not directly pass on whether the Tribe had satisfied the first prong by diligently pursuing its rights. Pet. App. 12a n.4.

## SUMMARY OF ARGUMENT

The court of appeals correctly held that the Tribe could not rely on equitable tolling to excuse its failure to file a contract claim within the CDA's six-year limitations period because no "extraordinary circumstance" prevented timely filing. *Holland* v. *Florida*, 560 U.S. 631, 649 (2010).

I. The court of appeals applied the correct legal standard for equitable tolling. As this Court held in *Holland*, a litigant seeking relief must show that (1) it was "pursuing its rights diligently" and (2) "'some extraordinary circumstance stood in [its] way' and prevented timely filing." 560 U.S. at 649 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Each of these two prongs must be satisfied, and here the court of appeals denied the Tribe's request for equitable tolling because it failed to establish the "extraordinary circumstances" prong.

II. The court of appeals was correct that no extraordinary circumstances justified the Tribe's failure to file its claims within the CDA's six-year limitations period. The Tribe's requests to the contrary are unavailing.

The Tribe contends (Br. 34-38) that it failed to timely file its claims because it relied on its supposed membership in the *Cherokee Nation* putative class action. But the Tribe's failure to present its claims to the contracting officer, in accordance with the CDA's plain terms, meant that it failed to meet the mandatory prerequisite for bringing a judicial action and therefore for membership in the *Cherokee Nation* putative class action. See Pet. App. 13a-14a.

Even after the denial of class certification in *Cherokee Nation*, the Tribe took no action for more than

four years, allegedly resting on its mistaken belief that class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974), would delay the CDA statute of limitations. Pet. Br. 39-40. Reliance on class-action tolling was unwarranted, however, given the CDA's straightforward terms and well-settled case law holding claim presentment is a mandatory prerequisite to subsequent judicial review of a contract claim against the government. Having rendered itself ineligible for membership in the *Cherokee Nation* putative class, the Tribe could not benefit from class-action tolling during the pendency of the class-certification decision in that case.

The prior *Ramah* class certification decision does not support a contrary conclusion: the Tribe could not reasonably rely on a non-binding, unpublished, interlocutory district court order, which was, in any event, contrary to precedent and distinguishable. The Tribe's mistake regarding its membership in the *Cherokee Nation* putative class and its eligibility for class-action tolling were simply a matter of its own miscalculation, for which equitable tolling is no cure. See *Holland*, 560 U.S. at 651 ("miscalculation" in litigation has never been a basis for equitable tolling).

The absence of extraordinary circumstances warranting equitable tolling is further underscored by the fact that the Tribe could have easily resolved any uncertainty about the claim deadline by complying with the modest procedural requirements before the CDA's statutory deadline expired. See *Pace*, 544 U.S. at 419 ("Had [the litigant] advanced [its] claims within a reasonable time of their availability, [it] would not now be facing any time problem.").

In addition, the Tribe fails to establish that class-action tolling caused its untimeliness because the Tribe delayed presentment until *after* the expiration of the deadline for its earliest-accruing claim that would have applied with full class-action tolling. *Holland* makes clear that the "extraordinary circumstance" must have "*prevented* timely filing." 560 U.S. at 649 (citation omitted; emphasis added); *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) ("[P]arty seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled."), cert. denied, 131 S. Ct. 3025 (2011).

Indeed, the Tribe acknowledges that it was not only aware of the facts necessary for its claim, but that it weighed the "risk and expense" of lodging its own allegations against the government after class-action certification was denied in *Cherokee Nation*, and that it chose instead to wait and monitor the pending tribal contract-support-costs litigation rather than to pursue its own claims. See Pet. Br. 41-48. A litigant may not invoke equitable tolling to ride the tailwinds of existing litigation until this Court "conclusively establish[es]" liability. *Id.* at 39. Rather, "the only sure way to determine whether a suit can be maintained to a successful result is to try it." *Versluis* v. *Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946).

III. The absence of diligence demonstrated by the Tribe's years of inaction further disqualifies the Tribe from equitable tolling. The Tribe can point to *no* action that it took to pursue its claims prior to 2005. Instead, the Tribe affirmatively executed an unconditional release of its contract claims. Equitable relief would be particularly inappropriate under such circumstances.

IV. The other factors identified by the Tribe—an asserted absence of prejudice to the government and the special relationship between Indian tribes and the United States—are not, as the Tribe concedes (Br. 49-52), independent grounds for equitable tolling. In any event, the government had no notice of the Tribe's individual claims, especially since the Tribe had affirmatively relinquished them, and equitable tolling would deny the government the central benefit of repose. And the government's special relationship with Indian tribes does not lend support to equitable tolling because Congress specifically made the CDA, with its express requirement for filing a claim within six years, applicable to ISDA contracts.

## ARGUMENT

### EQUITABLE TOLLING CANNOT BE APPLIED TO EXCUSE THE TRIBE'S FAILURE TO PRESENT ITS CONTRACT DISPUTES ACT CLAIMS BY THE STATUTORY DEADLINE

#### I. EQUITABLE TOLLING APPLIES ONLY IF THE PARTY "PURSUED ITS RIGHTS DILIGENTLY" AND "SOME EXTRAORDINARY CIRCUMSTANCE" PREVENTED COMPLIANCE WITH THE STATUTE OF LIMITATIONS

Equitable tolling is appropriate "only if" the litigant seeking tolling establishes that it was "pursuing its rights diligently" and that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Because "the circumstances of a case must be 'extraordinary' before equitable tolling can be applied," *Holland*, 560 U.S. at 652, courts grant equitable toll-

ing only "sparingly," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). See *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007) ("a rare remedy"). A "garden variety claim of excusable neglect" or a "miscalculation" in litigation has never been a basis for tolling. *Holland*, 560 U.S. at 651 (quoting *Irwin*, 498 U.S. at 96); see *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

The Tribe contends (Br. 30-31) that the court of appeals departed from this Court's articulation of the equitable tolling standard when the court required the Tribe to identify some "external obstacle[]" that prevented it from presenting its claims within the CDA's six-year limitations period. See Pet. App. 12a, 18a. The Tribe is incorrect. The requirement of an external obstacle is reflected in the canonical formulation of the "extraordinary circumstance" test, which demands that the litigant seeking tolling establish that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). That formulation would make little sense if equitable tolling were available when a competent litigant was responsible for its *own* delay. As the court of appeals explained, an extraordinary circumstance that could have "stood in [the party's] way" (*i.e.*, interposed an obstacle or impediment) so as to "prevent" the party from timely filing its claim logically requires circumstances beyond the party's control. Pet. App. 10a; see *Maples* v. *Thomas*, 132 S. Ct. 912, 923 (2012); Pet. App. 11a ("The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstand-

ing of the law or tactical mistakes in litigation.").[15] Thus the court of appeals' reference to an "external obstacle[ ]" was nothing more than a restatement of *Holland*'s precepts.

The standard applied by the court of appeals was nothing like the "rigid *per se* approach," Pet. Br. 33, rejected by this Court in *Holland*, where the Eleventh Circuit had categorically held that an attorney's unprofessional conduct, short of bad faith, divided loyalty, or like behavior, could never constitute an "extraordinary circumstance." See 560 U.S. at 649, 651. The court of appeals assessed the circumstances identified by the Tribe, individually and collectively, before concluding that it was "the Tribe's inadequate responses to relatively routine legal events," rather than "external obstacles," that "caused it to delay pursuing its claims." Pet. App. 12a.

There is also no merit to the Tribe's argument (Br. 26-30) that the court of appeals erred because it declined to address "whether the Tribe had exercised reasonable diligence." Although the Tribe asserts that "[t]he two components of the *Holland* test" are not distinct factors "to be applied separately," Br. 27,

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[15] Other circuit decisions have similarly and uniformly limited the circumstances warranting equitable tolling to those involving impediments beyond a litigant's control. See, *e.g.*, *Tucker* v. *Kingston*, 538 F.3d 732, 734-735 (7th Cir. 2008); *Downs* v. *McNeil*, 520 F.3d 1311, 1324-1325 (11th Cir. 2008); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S. 863 (2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Alvarez-Machain* v. *United States*, 107 F.3d 696, 700-701 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997). Cf. *Smith* v. *Johnson*, 247 F.3d 240, 2001 WL 43520, at *3 (5th Cir. Jan. 3, 2001) (per curiam) (Tbl.) (recognizing tolling where defendant's mental "incompetence impeded him from asserting his legal rights").

this Court has made clear that a litigant seeking equitable tolling must "establish[] [the] two elements" of that test, *Pace*, 544 U.S. at 418. This Court has thus rejected requests for equitable tolling where the litigant failed to meet one of the two *Holland* components, without addressing whether the litigant satisfied the other. See, *e.g.*, *Lawrence*, 549 U.S. at 336-337 (rejecting equitable tolling without addressing diligence because the habeas petitioner fell "far short of showing 'extraordinary circumstances'"); *Pace*, 544 U.S. at 418 (noting without resolving the litigant's argument that he had "satisfied the extraordinary circumstance test" and holding that, "[e]ven if [the Court] were to accept [his argument], he would not be entitled to relief because he has not established the requisite diligence").

In any event, the court of appeals did consider the issue of the Tribe's diligence—more precisely, its lack of diligence—in the course of assessing the circumstances that the Tribe contends led it to file untimely claims. See Pet. App. 19a ("Faced with a variety of reasonable litigation options, the * * * Tribe chose to wait and see if more favorable law would appear."); see also *id.* at 15a-17a (explaining ways in which the Tribe could have successfully pursued its claims). The court further considered whether the Tribe's circumstances "jointly amount[ed] to an 'extraordinary' obstacle," and concluded that, even when viewed together, the Tribe failed to meet the standard for equitable relief. *Id.* at 18a-19a. See Part III, *infra*.

The court of appeals therefore correctly articulated the standard for equitable tolling in a manner fully consistent with this Court's formulation in *Holland*.

## II. NO "EXTRAORDINARY CIRCUMSTANCE" STOOD IN THE TRIBE'S WAY AND PREVENTED IT FROM TIMELY FILING ITS CDA CLAIMS

The court of appeals correctly held that equitable tolling was unwarranted because the "tactical mistakes" identified by the Tribe—including its reliance on the pendency of the *Cherokee Nation* putative class action and its miscalculation regarding its eligibility for class-action tolling—were not extraordinary circumstances that stood in its way, but rather "obstacles * * * of its own making." Pet. App. 12a. Nor do concerns about the "[r]isk and expense" of subsequent litigation or any uncertainty in the substantive law constitute grounds for equitable tolling. Pet. Br. 41-46 (emphasis omitted).

Moreover, the district court in *Cherokee Nation* denied class certification *in 2001*, almost two years before the deadline for presenting the Tribe's claim for the first of the three years at issue. Yet the Tribe waited more than four years after 2001 to file its claims with IHS. These circumstances furnish no basis for equitable tolling.

### A. The Pendency Of The *Cherokee Nation* Putative Class Action Did Not Prevent The Tribe From Filing Timely CDA Claims

The Tribe asserts (Br. 35-36) that equitable tolling is appropriate because it "rel[ied] on the [*Cherokee Nation* putative] class action as a means of pursuing its claims" and "believed there was no need to pursue separate litigation" when the Tribe was "*already* participating in litigation as a member of the [*Cherokee Nation* putative] class," Br. 36, 39.

That argument fails for the simple reason that the Tribe never took the steps necessary to make itself

eligible for membership in the putative class in *Cherokee Nation*. Regardless of whether the Tribe could have pursued its claims through a class action at the *litigation* stage, the CDA unambiguously required the Tribe to first present claims to the IHS contracting officer. See pp. 29-36, *infra*. The Tribe could not refrain from fulfilling that basic administrative prerequisite simply because other tribes "were already litigating the same issues in several federal courts." Pet. Br. 39 (emphasis omitted).

Moreover, certification of the *Cherokee Nation* class was denied on February 9, 2001—almost two years before the deadline for presenting the Tribe's 1996 claim (December 31, 2002)—leaving ample time for the Tribe to file its claims with the IHS contracting officer. See *Cherokee Nation* v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001). Once class certification was denied in *Cherokee Nation*, the Tribe certainly knew that it had to pursue its claims on its own. It is hardly equitable to allow the Tribe to rely on the limited pendency of the *Cherokee Nation* putative class action prior to 2001 as a basis for tolling all the way until September 2005, when it filed its claims. See *Harper* v. *Ercole*, 648 F.3d 132, 137-138 (2d Cir. 2011) (where the alleged impediment to filing "arose and concluded early within the limitations period[,] * * * a diligent petitioner would likely have no need for equity to intervene to file within the time remaining to him"); *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) ("[P]arty seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled."), cert. denied, 131 S. Ct. 3025 (2011). The district court's rationale for denying class certification in *Cherokee Nation*, which emphasized each

tribe's interest in pursuing its own individual claims in court, only underscored that point. 199 F.R.D. at 365 ("[E]ach tribe has a great interest in *individual litigation* to aggressively protect and defend [its] interest under [its] individual contracts.") (emphasis added).

**B. The Tribe's Mistaken Belief That It Could Benefit From Class-Action Tolling Did Not Warrant Equitable Tolling For Its Four-Year Delay In Filing A Claim Following The Denial Of Class Certification In *Cherokee Nation***

The Tribe seeks to justify its failure to act after the denial of class certification in *Cherokee Nation* by making the further argument that it reasonably assumed that class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), would extend the CDA's statute of limitations by the nearly two years (707 days) that the *Cherokee Nation* putative class action had been pending. Any such reliance on class-action tolling was misplaced. It has long been settled that claim presentment is a mandatory prerequisite to federal court jurisdiction. Having failed to present its claims to the IHS contracting officer, the Tribe thus lacked a reasonable basis for believing it could rely on the pendency of the *Cherokee Nation* class certification motion to toll the CDA deadline. Indeed, further delay beyond the CDA's six-year deadline was particularly unreasonable considering the ample time remaining for filing after the *Cherokee Nation* class-certification denial and the ease with which the filing requirement could have been satisfied. And in all events, the Tribe's own legal or tactical error does not constitute an extraordinary

circumstance—an external impediment—that could justify equitable tolling.

***1. By failing to present an administrative claim to the IHS contracting officer, the Tribe failed to satisfy a basic prerequisite to class membership, and thus could not benefit from class-action tolling***

The Tribe does not challenge the court of appeals' determination that, by failing to timely present its administrative claims, it could not properly be a member of the putative *Cherokee Nation* class. See Pet. App. 56a. Nor does the Tribe dispute that, as a result, the CDA statute of limitations was not in fact subject to class-action tolling under *American Pipe* during the pendency of the *Cherokee Nation* class-certification proceedings, as the D.C. Circuit concluded in its first decision in this case. See Pet. App. 44a-68a. The Federal Circuit likewise had earlier rejected class-action tolling on the same ground in *Artic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785 (2009) (*ASNA I*), cert. denied, 561 U.S. 1026 and 562 U.S. 835 (2010).

The Tribe nonetheless contends that it is entitled to invoke equitable tolling because those decisions constituted a "change in the law governing presentment in the tribal contract support context," that upended its reasonable expectations. Br. 36-37. That argument lacks merit. Longstanding and uniform appellate precedent made clear that presentment of a CDA claim to a contracting officer was a prerequisite to invocation of federal court jurisdiction and, therefore, to membership in a class action challenging contract performance.

The straightforward terms of the CDA establish that any contract dispute must begin with the presentment of a written claim to the contracting officer.

41 U.S.C. 7103(a). The CDA then provides clear step-by-step instructions for judicial review of a contracting officer's decision and, no matter which route is chosen, the process of reaching federal court must begin with submission of a claim to the contracting officer and issuance of the officer's final decision. See 41 U.S.C. 7104(a) (appeal to agency board), 7104(b) (contractor may bring an action directly on the claim in the CFC "in lieu of" appealing to the agency board), 7107(a)(1) (contractor may appeal contracting officer's decision to agency board and then to the Federal Circuit); see also 41 U.S.C. 7103(d)-(f) (issuance of a contracting officer's final decision); see also *A.E. Finley & Assocs.* v. *United States*, 898 F.2d 1165, 1168 (6th Cir. 1990) (per curiam) (under the CDA, "[t]he first step in the process is for * * * the contractor * * * to make a 'claim'"). Claim presentment is also a prerequisite to the jurisdiction of a federal district court to entertain a CDA action under ISDA, since ISDA subjects the district court's jurisdiction to the mandatory application of the CDA and further provides that such jurisdiction is "concurrent with the [CFC]." 25 U.S.C. 450m-1(a) and (d).

The courts of appeals have applied the CDA's clear terms to uniformly hold that presentment of an administrative claim is a jurisdictional prerequisite to review in federal court. See, *e.g.*, *England* v. *Swanson Grp.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *James M. Ellett Constr. Co.* v. *United States*, 93 F.3d 1537, 1541-1542 (Fed. Cir. 1996); *Bath Iron Works Corp.* v. *United States*, 20 F.3d 1567, 1578 (Fed. Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Garrett*, 6 F.3d 1547, 1561-1562 (Fed. Cir. 1993) (citing cases); *United States* v. *Grumman Aerospace Corp.*, 927 F.2d

575, 579-580 (Fed. Cir.), cert. denied, 502 U.S. 919 (1991); see also *Made in the USA Found.* v. *United States*, 51 Fed. Cl. 252, 254 (2001) ("[J]urisdiction under the CDA is predicated" on the contractor's "submission of a written claim" and the "agency's issuance of a final decision."). This presentment rule was not only binding law in the Federal Circuit, which has appellate jurisdiction over CDA claims generally, but also was the rule in the D.C. Circuit, where the Tribe brought its ISDA claims. See *A & S Council Oil Co.* v. *Lader*, 56 F.3d 234, 236, 242 (D.C. Cir. 1995) (directing dismissal of plaintiff's CDA claims rather than transferring them to the CFC because judicial review is unavailable where plaintiffs "failed to exhaust the jurisdictional remedies required for relief under the CDA"); see also *Diversified Energy, Inc.* v. *Tennessee Valley Auth.*, 339 F.3d 437, 444 (6th Cir. 2003) (CDA presentment requirement is "jurisdictional in nature; a failure to satisfy it will preclude the district court from entertaining an appeal of the contractor's claims").[16]

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[16] The structure and legislative history of the CDA confirm that claim presentment is a jurisdictional prerequisite to federal court review. In 1992, Congress, in a section entitled "Jurisdiction," amended the CDA to overrule the Federal Circuit's holding that the sworn certification of a claim to the contracting officer was also jurisdictional, but Congress left the basic presentment requirement intact. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a)(1), 106 Stat. 4518 (41 U.S.C. 7103(b)(3)) ("A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim."); see also H.R. Rep. No. 1006, 102d Cong., 2d Sess. Pt. 1, at 28 (1992) (citing Federal Circuit cases that held absence of certified claim deprived court of jurisdiction). Significantly, Congress did not then or since overturn the court of appeals' longstanding

Finally, it was well settled that where presentment of an administrative claim is a prerequisite to suit, a class action cannot encompass claimants who failed to satisfy that requirement. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 703-704 (1979) (class certification including putative members who failed to file administrative claims was "plainly too broad"); *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764 (1975) (district court lacked jurisdiction over social security benefits class action where complaint failed to allege class members filed administrative claim); see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 198 (2d Cir. 1987) (district court lacked jurisdiction over asserted class members who did not comply with presentment requirement under Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*); *Lunsford* v. *United States*, 570 F.2d 221, 224-227 (8th Cir. 1977) (class action can be maintained under FTCA only if each putative member has individually satisfied all jurisdictional requirements). As a result, the Tribe could not rely upon the prospect of class-action tolling to delay filing its administrative claim until after the six-year CDA limitations period had expired. See *American Pipe*, 414 U.S. at 554 (1974) (class-action tolling available only to "all asserted members of the class *who would have been parties* had the suit been permitted to continue as a class action") (emphasis added). Nor can it claim

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rule that the presentment of the claim is a jurisdictional prerequisite to suit. See *Texas Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been . given a uniform interpretation by inferior courts . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

now that its mistaken reliance warrants *equitable* tolling.

Courts have recognized only limited exceptions to the rule that individual claimants must meet all administrative prerequisites before qualifying as class members. For example, in *Bowen* v. *City of New York*, 476 U.S. 467, 484-485 (1986), this Court permitted social security claimants who challenged a "systemwide, unrevealed policy" to participate in a class action without full exhaustion of their administrative remedies. Even then, the Court reaffirmed that *presentment* of a claim in the first place *was* a jurisdictional prerequisite to suit. See *id* at 483; see also *Mathews* v. *Eldridge*, 424 U.S. 319, 330-331 (1976) (allowing individual due process challenge to proceed following presentment notwithstanding plaintiff's failure to fully exhaust administrative remedies because (1) the constitutional claim was "entirely collateral to [plaintiff's] substantive claim of entitlement," and (2) irreparable harm would result from requiring full exhaustion of remedies). The Tribe's suit, which seeks performance on particular ISDA contracts, is not in any event analogous to the circumstances in *Mathews* or *Bowen*.[17]

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[17] In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that individuals who had not filed charges with the Equal Employment Opportunity Commission could nonetheless be considered class members in a suit against a private employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* That ruling was based on specific features of Title VII's remedial scheme and the legislative history. See 422 U.S. at 414 n.8. The CDA, by contrast, makes claim presentment mandatory, and, further, it shares none of the remedial statutory features of Title VII. See Pet. App. 56a-57a; *ASNA I*, 583 F.3d at 795-796.

Holding the Tribe to the statutory deadline also makes sense considering that the purpose of class-action tolling is to alleviate the "uncertainty of putative class members regarding whether the court will certify a class." Pet. App. 59a. In the absence of class-action tolling, putative class members who could sue on their own would face the choice of either filing protective motions to intervene or risking forfeiture of their rights if class certification were denied after the statute of limitations had expired. *Id.* at 58a-59a; see *ASNA I*, 583 F.3d at 797 ("[T]he main point of class action tolling * * * is to provide protection against the running of the statute of limitations for parties who could potentially be included as class members[,] * * * but who are ultimately left outside the class."); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) (class-action tolling allows "class members" "to rely on the existence of the suit to protect their rights"). But for a mandatory precondition (like presentment) to *any* suit the calculus is different: "Regardless of whether [class] certification is granted, *every contractor must submit its claim* to the contracting officer," and only after a contracting officer's denial of that claim "does the contractor have a choice between participating in the class or proceeding individually." Pet. App. 59a (emphasis added). It was therefore irrelevant whether the Tribe sought to pursue its claims individually or by class participation; either way, timely presentment of a claim to IHS was the necessary first step.

For these reasons, the court of appeals was correct in concluding on the prior appeal that Rule 23's objectives of "efficiency and economy of litigation" would be disserved by application of class-action tolling to par-

ties who had not satisfied the mandatory administrative prerequisites to suit. Pet. App. 60a (quoting *American Pipe*, 414 U.S. at 553). Extension of class-action tolling to such parties would "invit[e] abuse" by encouraging lawyers "to frame their pleadings . . . [to] save members of the purported class who have slept on their rights." *Id.* at 61a (brackets in original) (quoting *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring)). Substitution of equitable tolling for class-action tolling, as the Tribe now attempts here, would pose the same risk of abuse.

For similar reasons, the Tribe's characterization (Br. 37) of the *Cherokee Nation* putative class action as a "defective pleading" is misguided. See *Irwin*, 498 U.S. at 96 (noting that equitable tolling may be available "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"). It was not a flaw in the *Cherokee Nation* pleadings that barred the Tribe from membership in the putative class; the Tribe was excluded from the *Cherokee Nation* putative class by virtue of its own failure to submit a timely claim with the contracting officer. See Pet. App. 55a-57a.

The ineligibility of the Tribe for membership in the putative class in *Cherokee Nation* was thus compelled by settled law, and the resulting inapplicability of class-action tolling flowed from that determination. And as noted above, petitioner does not challenge the court of appeals' holding that class-action tolling was unavailable here. It follows that equitable tolling was likewise unavailable—for much the same reason. By waiting until after the expiration of the CDA limitations period to file its administrative claims, the Tribe simply made its own miscalculation, which does not

constitute an extraordinary circumstance warranting equitable tolling under *Holland*.

***2. Neither the* Ramah *class action, nor any special features of ISDA contract-support-costs litigation, constituted an extraordinary circumstance exempting the Tribe from timely satisfying the CDA's presentment requirement***

The Tribe attempts to circumvent the well-established presentment rule by claiming reliance on the district court's unpublished class certification opinion and order in *Ramah*. See *Ramah Navajo Chapter* v. *Lujan*, No. 90-cv-957 (D.N.M. Oct. 1, 1993) (J.A. 35-39). The Tribe contends that at the time it was issued, the *Ramah* order was the "only ruling addressing class certification in the context of the tribal contract support costs claims" and that it "confirmed that [the Tribe] could rely on the class action" and class-action tolling without satisfaction of the CDA's presentment requirement. Pet. Br. 35-36. But the Tribe advances no reasonable basis for distinguishing tribal contract-support-costs litigation from the long line of controlling authority, see pp. 30-31, *supra*, requiring presentment of contract disputes through the filing of a claim with the contracting officer.

As a threshold matter, the *Ramah* class certification order was an extremely thin reed on which to rely. It was an unpublished, interlocutory district court decision with little legal significance outside the confines of that particular litigation. It is axiomatic that a "decision by a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta* v. *Greene*, 131 S.

Ct. 2020, 2033 n.7 (2011) (citation omitted). A litigant that chooses to rely on a non-precedential district court ruling does so at its own hazard. Any such reliance was particularly misplaced here, where the ruling contradicted long-established appellate precedent holding that presentment of a claim is a jurisdictional prerequisite to suit, and to decisions of this Court and others holding that the failure to satisfy such a prerequisite bars membership in a class action. See *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1144 (D.N.M. 2006) (tribal plaintiff "can hardly be said to rely on the oblique argument that a class certification order in a *separate* case allows [it] to forgo exhaustion of [its] claims in *this* case").[18]

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[18] Similarly, no significance should be attached to the letter from class counsel in *Cherokee Nation* to tribal leaders stating that the filing of the putative class action "ha[d] the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34. To the extent that the Tribe detrimentally relied on this letter, such a "'garden variety claim' of attorney negligence" is no basis for tolling, *Holland*, 560 U.S. at 652 (quoting *Irwin*, 498 U.S. at 96), particularly considering that the advice was sent by class counsel, who did not individually represent the Tribe at the pre-class-certification stage of the litigation, see Comm. on Ethics and Prof'l Responsibility, American Bar Ass'n, *Formal Op. 07-445: Contact by Counsel with Putative Members of Class Prior to Class Certification* (Apr. 11, 2007). In any event, class counsel's statement was limited to those "individual tribes eligible for membership in the class," and the letter cautioned that "it will be up to the federal court to decide whether the case can proceed in this manner." J.A. 34. As noted, the Tribe rendered itself ineligible for class membership by consciously deciding to delay submission of its claims to the contracting officer. And while class counsel's letter said that the filing of the class action would stop the running of any statute of limitations against eligible tribes, it did not say that a tribe could continue to

Moreover, the *Ramah* class certification order itself should have put the Tribe on notice that presentment of claims was a necessary step to suit in federal court. The district court in *Ramah*, after surveying the case law, found it "*clear* that when a government contractor wishes to seek relief in connection with the performance of his contract, *he must first submit a claim to the agency contracting officer* and receive an opinion from that official," and that the "completion of these steps is a jurisdictional prerequisite" to suit under the CDA. See J.A. 37-38 (emphases added).

The district court's decision in *Ramah* to certify the class also was not based on some inherent feature of all CDA litigation or, as the Tribe contends (Br. 35), on "unique features of the contract support litigation." Rather, the court certified the *Ramah* class, notwithstanding putative class members' failure to present their claims, because it found the allegations "d[id] not concern a typical contract dispute wherein issues of performance need be addressed," J.A. 38, but rather challenged "the [BIA's] policies and practices" and sought "to make systemwide reforms," J.A. 39.[19]

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delay filing a claim if class certification was denied—as the Tribe later did for more than four years.

[19] The *Ramah* opinion also was thinly reasoned and unpersuasive even in that context. In support of its conclusion that presentment of claims was unnecessary for class certification, the district court cited only one decision, *Association for Community Living in Colorado* v. *Romer*, 992 F.2d 1040 (10th Cir. 1993), which recognized certain exceptions to the exhaustion requirement for claims brought against non-federal-government defendants under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* These exceptions were specific to IDEA's own statutory scheme. See 992 F.2d at 1044. IDEA bears little resemblance to the CDA, which establishes a mandatory administrative procedure

By contrast, it was the tribes' challenge to performance under their individual contracts that led the court to deny class certification in *Cherokee Nation*. 199 F.R.D. at 363-365. When the Tribe ultimately presented its untimely claims to the contracting officer in September 2005, it too alleged deficient contract performance. See Lodged Materials 1-10.[20] For these reasons, any reliance on the *Ramah* class certification order was unjustified. And again, the Tribe's own mistaken reliance on the *Ramah* class certification order did not "prevent" it from making a timely

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to resolve all contracting disputes with the federal government. See H.R. Rep. No. 1556, 95th Cong., 2d Sess. 6 (1978); see also *Zuni*, 467 F. Supp. 2d at 1113 ("The plain statutory language of the CDA and case law interpreting the provision does [sic] not appear to provide the same flexibility" as IDEA.).

[20] The Federal Circuit in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA II*) (Pet. App. 75a-97a), determined that, notwithstanding ASNA's failure to present its claims, ASNA, a consortium of tribes, could reasonably rely on the *Ramah* class certification to believe it could be a member of the *Zuni* putative class action, which was pending in the same judicial district and before the same district judge as *Ramah*. Pet. App. 89a-90a. But as Judge Bryson's dissent in *ASNA II* persuasively demonstrated, the *ASNA II* majority was incorrect. Even though the *Zuni* putative class action was pending before the same district judge who decided *Ramah*, "a reasonably diligent party would have inferred that *Zuni* was not likely to proceed in the same manner as *Ramah*": "*Ramah* was a different case with different claims," *id.* at 95a; "the judge in *Ramah* was operating under a different statutory framework" because the CDA was subsequently amended, after the *Ramah* class certification decision, to add the six-year limitations period, *ibid.*; and additional developments, including the denial of class certification in *Cherokee Nation*, indicated that "the *Ramah* certification may have been questionable," *id.* at 93a-94a. The Tribe should have been aware of these same considerations.

filing and therefore is not an extraordinary circumstance warranting equitable tolling.

***3. The Tribe cannot establish that its reliance on class-action tolling caused its failure to meet the CDA deadline***

The Tribe's equitable tolling argument is further undermined by the fact that the Tribe did not peg its late filing of an administrative claim to the supposed class-action tolling of the statutory deadline; rather, the Tribe waited an additional *274 days* past when its 1996 claim would have been due if that six-year period were extended by the entire time the *Cherokee Nation* putative class action had been pending.[21]

Equitable tolling is available only where the alleged "extraordinary circumstances" *caused* the party to miss its deadline. *Holland*, 560 U.S. at 649 ("extraordinary circumstances" must have "*prevented* timely filing") (emphasis added); see *Valverde* v. *Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (explaining need for a "causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of [the] filing"); *Harper*, 648 F.3d at 137 ("[I]t is not enough for a party to show that he experienced extraordinary circumstances. He must further demonstrate that those circumstances caused him to miss the original filing deadline."). The Tribe's additional delay beyond even the deadline that

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[21] The Tribe filed its claims on September 7, 2005—981 days after the expiration of the 1996 claim's deadline of December 31, 2002. The *Cherokee Nation* putative class action was pending between March 5, 1999, and February 9, 2001—or 707 days—meaning that the Tribe waited an additional 274 days beyond the deadline for its earliest accruing claim if the full 707 days were added to the CDA's six-year limitations period.

would have applied with full class-action tolling substantially undermines its present contention that reliance on the prospect of class-action tolling lulled it into inaction after class certification was denied in *Cherokee Nation*. The Tribe acknowledges as much (Br. 39), stating that, "rather than immediately file" its own claims, it "chose to monitor the pending litigation to see whether liability would be conclusively established" against the government.

### C. Perceived Futility Does Not Excuse The Failure To Present A Claim, And Presentment Was Not In Any Event Futile Here

Acknowledging that the limited period the putative class action in *Cherokee Nation* had been pending would be insufficient to warrant equitable tolling for more than four years after class certification was denied, the Tribe contends (Br. 38-40) that equitable tolling should excuse any additional delay because it believed that IHS "would almost certainly deny the Tribe's claims." The Tribe, therefore, posits that it should not have been required to incur the "[r]isk and expense" of pursuing its own individual claims, see Br. 41-46 (emphasis omitted), but rather could wait until "the [g]overnment's liability was established by this Court in *Cherokee*," Br. 25. See Br. 48 (Tribe chose to "monitor existing litigation to see whether there was even any basis for its claims * * * before committing itself and the [g]overnment to further litigation."). Adopting the Tribe's position would establish an unprecedented rule allowing a litigant to ride the coattails of existing litigation and excuse its untimeliness on an open-ended basis until after the validity of its claim was conclusively established.

The court of appeals correctly dismissed the Tribe's arguments as meritless, holding that the Tribe was required to meet the statutory deadlines even if it "doubted the viability of its arguments." Pet. App. 16a. Such ordinary litigation risks do not excuse a litigant from timely pursuit of its claims. See *Boling* v. *United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000) (finding "no authority which would suggest that the presence of adverse precedent automatically leads to equitable tolling."); *Thoen* v. *United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985) (rejecting argument that presentment of a certified claim should be excused because it "would be a useless act"); see also *Weinberger*, 422 U.S. at 766 (holding that a "statutorily specified jurisdictional prerequisite" "may not be dispensed with merely by a judicial conclusion of futility").

The Tribe's futility allegations are particularly weak here, because other tribes had already met with success in contract-support-costs litigation. Indeed, in its September 2005 claim presented to IHS, the Tribe expressly relied on the 1997 Tenth Circuit decision in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, which applying the version of ISDA in effect at that time, recognized the *validity* of the Tribe's miscalculation theory against Interior, and which, on remand, led to a substantial settlement with BIA in the Tribes' favor. See Lodged Materials 2, 5, 8 (alleging that IHS "miscalculated the amount of indirect costs * * * by employing the same method * * * declared illegal in the *Ramah Navajo* case"); see also Pet App. 8a. Similarly, in 1999, in the *Cherokee Nation* administrative appeal, the IBCA recognized the validity of shortfall claims analogous to those later raised in the Tribe's

claims, see *Appeals of Cherokee Nation*, No. 3877, 1999 WL 440045 (IBCA June 30, 1999), aff'd on reconsideration, *Appeals of Cherokee Nation*, No. 4000/98, 2001 WL 283245 (IBCA Mar. 21, 2001), and the Federal Circuit affirmed that decision in 2003, *Thompson* v. *Cherokee Nation*, 334 F.3d 1075. See Lodged Materials 2, 5, 8. At the same time, the district court in the other *Cherokee Nation* proceeding recognized the distinct nature of each contract when refusing to certify a class, further demonstrating the need for the Tribe to present its specific contract claims. See 199 F.R.D. at 363. The Tribe can hardly cite the "futility" of its claims where it had at least two potentially receptive Circuits, a positive decision from the IBCA to support its claims, and a district court decision emphasizing the individual nature of each contract. And, although the *Cherokee Nation* district court denied similar (but not identical) claims in 2001, until 2002, no court of appeals had rejected claims like the Tribe's. See Pet. App. 16a.

The Tribe, moreover, acknowledges that it delayed, not because the process of administrative and judicial review was actually *futile*, but because it wanted *certainty* that its claims would ultimately prevail. See Pet. App. 100a (Wakau Decl. ¶ 9). Only once the Tribe received "confirmation that its claims were viable" through this Court's *Cherokee Nation* decision did the Tribe take any action on its claims. *Id.* at 100a-101a.

The existence of some adverse precedent cannot allow a litigant to evade statutory time limits while it takes no action, waiting to see if this Court will "conclusively establish[]" the viability of its legal theories. See *Whiteside* v. *United States*, 775 F.3d 180, 186 (4th Cir. 2014) (en banc) ("Equitable tolling * * * may

not be applied where * * * the only impediment to timely filing was the discouragement felt by petitioner when calculating his odds of success."), cert. denied, 135 S. Ct. 2890 (2015). To the contrary, courts have long recognized that "[t]he only sure way to determine whether a suit can be maintained is to try it," and "a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law." *Communications Vending Corp. of Ariz.* v. *Federal Communications Comm'n*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) (quoting *Fiesel* v. *Board of Educ.*, 675 F.2d 522, 524-525 (2d Cir. 1982)). A litigant must instead "test his right and remedy in the available forums" rather than wait until "through the labor of others the way was made clear." *Ibid.* By choosing to wait for the outcome in *Cherokee Nation* in this Court, the Tribe did exactly what this rule proscribes.

**D. The Risks And Costs Of Subsequent Litigation Cannot Support Equitable Tolling Of The Claim-Presentment Deadline**

The Tribe next asserts that its "lack of financial resources" "stood in the way" of its "filing a claim prior to this Court's ruling in *Cherokee*" and that the court of appeals failed to properly evaluate the "[r]isk and expense of filing individual claims." Pet. Br. 41-46 (emphasis omitted).

If the costs of potential litigation permitted a party to ignore statutory deadlines, tolling would become the rule, not the exception. See Pet. App. 18a ("If a lawsuit's 'breadth and complexity' were an 'extraordinary circumstance,' few statutes of limitations would function."); *id.* at 34a ("[I]t is common for a litigant to be confronted with significant costs to litigation, limited financial resources, and uncertain outcome based

upon an uncertain legal landscape, and impending deadlines. These circumstances are not 'extraordinary.'"). The Tribe points to nothing about the costs of filing its two-to-three page claims with the contracting officer, or even about the prospect of subsequent litigation, that would bring this case outside the norm—much less be such a dramatic departure that it could properly be regarded as an "extraordinary circumstance"—assuming *arguendo* that potential risk and expense of litigation could ever warrant equitable tolling. By waiting to file its claims, moreover, the Tribe only deferred, but did not avoid, the cost of claim submission and ensuing litigation, while having forfeited, by virtue of its untimeliness, any potential benefit from success on the merits.

The fee- and cost-shifting provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C. 504; 28 U.S.C. 2412, further refute any argument that the potential expense of litigation justified the Tribe's untimely presentment of an administrative claim. By making EAJA applicable to qualifying administrative appeals of ISDA claims, Congress directly addressed any concerns about the cost of submitting ISDA contract claims to the government. See 25 U.S.C. 450m-1(c); see also Senate Report 36-38 (amendments making EAJA applicable and adopting related fee-shifting rules for qualifying ISDA contracts were intended "to give self-determination contractors viable remedies for compelling BIA and IHS compliance with [ISDA]"). Especially since Congress expressly addressed cost concerns by statute, there is no basis for the courts to impose tolling on the view that it would be more equitable to do so. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001)

("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.").

### III. THE TRIBE FAILED TO DEMONSTRATE REASONABLE DILIGENCE IN THE PURSUIT OF ITS CLAIMS

The Tribe asserts (Br. 27-28) that the court of appeals erred by failing to consider its circumstances "in light of" its supposed diligence. But *Holland*'s diligence prong is of no assistance to the Tribe. "The litigant seeking equitable tolling bears the burden" of establishing both prongs of the equitable tolling standard." *Pace*, 544 U.S. at 418. Failure to establish "extraordinary circumstances" is thus fatal to the Tribe's argument. In any event, the Tribe could not possibly satisfy the "reasonable diligence" argument. Here the Tribe can point to *no* action taken to pursue its claims prior to its CDA deadlines, other than "monitor[ing] existing litigation" (Br. 48).

Indeed, the only affirmative act that the Tribe took in relation to the 1996-1998 contracts during the CDA's six-year period was to *relinquish* its claims by executing an unequivocal contractual release for all three years. J.A. 104, 240-242. The execution of the contract release should itself bar the Tribe from recovery, and *a fortiori* from equitable tolling of its claims-filing deadlines. See *Alliance Oil & Ref. Co.* v. *United States*, 856 F.2d 201, 1988 WL 82705, at *1 (Fed. Cir. Aug. 11, 1988) (per curiam) (Tbl.) ("A contractor who executes an unconditional general release and fails to exercise his right to reserve claims is barred from maintaining a suit for damages or additional compensation under the contract based on events that occurred prior to the execution of the release."); *Mingus Constructors, Inc.* v. *United States*, 812 F.2d 1387, 1389, 1391 (Fed. Cir. 1987).

All the relevant facts were in the Tribe's possession from the beginning of the statutory period. Nor does the Tribe dispute the simplicity of the claim-filing process, Br. 41, which involves only submission of a letter or "short written statement outlining the basis of the claim, estimating damages, and requesting a final decision." Pet. App. 4a; see 25 C.F.R. 900.218. The brief letters eventually filed by the Tribe in this case illustrate the modest procedural requirements at issue. See Lodged Materials 1-10.

Considering the relative ease of the claim procedures, moreover, any uncertainty about the filing deadline could have been readily resolved if the Tribe took the basic steps necessary to preserve its claims within the statutory period. See Pet. App. 96a (*Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (*ASNA II*)) (Bryson, J., dissenting) ("[A] prudent course would have been for [the Tribe] to prepare and submit the letters prior to the expiration of its claims."); *Fisher* v. *Johnson*, 174 F.3d 710, 716 (5th Cir. 1999) ("[E]quity does not require tolling" "absent a showing that [the litigant] diligently pursued his application" during the time remaining in the statute of limitations and "still could not complete it on time."), cert. denied, 531 U.S. 1164 (2001); see also *Wion* v. *Quarterman*, 567 F.3d 146, 149 (5th Cir. 2009) ("Even where * * * the applicable law is unclear or unsettled, * * * [t]he petitioner should 'err on the side of caution and file [the] petition within the most conservative of possible deadlines.'") (second set of brackets in original) (quoting *Fierro* v. *Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003)), cert. denied, 558 U.S. 1116 (2010); *United States* v. *Marcello*, 212 F.3d 1005, 1010 (7th Cir.)

("The [litigants'] argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest."), cert. denied, 531 U.S. 878 (2000).

The Tribe failed to meet the CDA deadline, even though it knew that it must pursue its claims individually when certification of the *Cherokee Nation* putative class action was denied, which was almost two years before the expiration of the limitations period for the earliest of its claims. The Tribe nevertheless delayed presentment of its claims for over four more years. That delay stands in stark contrast to the persistent diligence exercised by the petitioner in *Holland*, who prepared and promptly filed his own pro se habeas petition "the *very day* that [he] discovered that his AEDPA clock had expired due to [his attorney's] failings." 560 U.S. at 653 (emphasis added).

The Tribe's position is instead analogous to that of the petitioner in *Pace*, *supra*, who "waited years, without any valid justification, to assert" his claims. 544 U.S. at 419. As in *Pace*, had the Tribe only "advanced [its] claims within a reasonable time of their availability, [the Tribe] would not now be facing any time problem." *Ibid.* "Under long-established principles," the Tribe's failure to pursue its claim in any way during the six-year CDA timeframe reflects a "lack of diligence" that "precludes equity's operation." *Ibid.*; see *Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *McQuiddy* v. *Ware*, 87 U.S. (20 Wall.) 14, 19 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights.").

## IV. NO OTHER "EQUITABLE" FACTORS WARRANT TOLLING

The Tribe also points to what it asserts are other "equitable factors" to support its tolling argument, including the "absence of prejudice to the [g]overnment" and the "special relationship" between the United States and Indian tribes. Pet. Br. 49-52. As the Tribe concedes, these factors are not independent bases for equitable tolling.

### A. Absence Of Prejudice Is Not An Independent Basis For Equitable Tolling

The Tribe contends (Br. 49) that its delayed filing had "no prejudicial impact on the [g]overnment," which, it argues, "weighs strongly in favor of" tolling. This Court has held, however, that absence of prejudice to the opposing party "is not an independent basis for invoking the doctrine [of equitable tolling] and sanctioning deviations from established procedures." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). Rather, the absence of prejudice is "a factor to be considered in determining whether the doctrine of equitable tolling should apply *once a factor that might justify such tolling is identified.*" *Ibid.* (emphasis added). Because the Tribe has failed to identify any "extraordinary circumstance" that could trigger the possibility of tolling, an asserted absence of prejudice to the government is irrelevant.

The Tribe, moreover, is incorrect in asserting (Br. 50) that no prejudice resulted from its delayed filing because the *Cherokee Nation* putative class action put the government "on notice of the Tribe's claims." First, the government could hardly have been "on notice" of the Tribe's claims when it had executed a

release for its 1996-1998 ISDA contracts without reservation of any claims. J.A. 240-241.

Second, contrary to the Tribe's contention (Br. 50) and the opinion of the Federal Circuit in *ASNA II*, see Pet. App. 90a, neither the *Cherokee Nation* suit nor other tribal contract-support-costs litigation put the government "on notice" of the Tribe's particular claims. The purpose of the presentment requirement is to furnish such claim-specific notice. While suits by other tribes outlined several theories of government liability for additional contract-support-costs payments, the relevant notice for limitations purposes is not of legal theories in the abstract, but of concrete particular claims, including the underlying facts, legal assertions, and damages claimed. See *M. Maropakis Carpentry, Inc.* v. *United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (CDA requires "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.") (citation omitted); see also Lodged Materials 2, 5, 8-9 (claims); Lodged Materials 15-16-20-23, 29-33 (contracting officer decisions explaining the various theories underlying each of the Tribe's claims).

The ultimate outcomes of other pending cases likewise depends on a review of the individual contract terms, the individual calculation and negotiation of contract-support-costs amounts for each year, and the actual payments made. It was precisely this individual nature of the tribes' claims that led the district court to deny class certification in *Cherokee Nation*. See 199 F.R.D. at 360. For this reason, particularly in the absence of the requisite claim presentment, the *Cherokee Nation* putative class action was insufficient to put the government on notice of the evidence that

might be required to answer the Tribe's claims or of the government's potential liability—information that would be critical to possible resolution of the dispute, allocation of funding, and litigation management. See, *e.g.*, Lodged Materials 15, 21, 29 (contracting officer decisions) (finding the Tribe provided insufficient information to evaluate its allegations that its indirect cost rate was miscalculated).

Finally, the Tribe's submission entirely ignores the central purpose of a statute of limitations—repose. See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (noting the "considerable common ground in the policies underlying" statutes of limitations and statutes of repose). Bringing closure to contracts that ended six years earlier, for which no claims were filed, aids the administration of programs like IHS's which are constrained by budget cycles and the termination of annual contract terms at the conclusion of each year.

### B. The Relationship Between Tribes And The United States Does Not Excuse Failure To Adhere To The CDA's Statutory Deadline

The Tribe lastly invokes (Br. 51-52) the "special government-to-government relationship between tribes and the United States" as a basis for equitable tolling. To be sure, ISDA's declaration of commitment recognizes Congress's intent to maintain the government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people." 25 U.S.C. 450a(b). But that statutory purpose does not negate the clear and mandatory rules established by ISDA, which expressly made the CDA applicable to disputes arising out of self-determination contracts. 25 U.S.C. 450m-1(d).

In support of its contention that the Tribe's special relationship with the United States supports equitable tolling, the Tribe quotes a Senate Report on the 1988 amendments to ISDA as stating that the "federal government's trust responsibility [to Indians] tempers all of the ordinary contract rules as applied to self-determination contracts." Pet. Br. 52 (brackets in original) (quoting Senate Report 36). That Senate Report in no way suggests, however, that the "special relationship" between Tribes and the government creates a broad exemption to the CDA's unambiguous presentment requirement and filing deadline. Indeed, the statement quoted by the Tribe does not refer to the CDA's application at all, but rather to a previous subsection, which amended ISDA to allow tribes to treat certain legal expenses as contract administration costs. See Senate Report 35.[22]

Moreover, any such interpretation of ISDA would be contrary to the courts of appeals' long-held view that the CDA's statutory limitations periods should "be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Similarly, in *United States* v. *Mottaz*, 476 U.S. 834, 848 n.10 (1986), this Court declined to exempt an Indian tribe from the applicable statutory deadline where its claim was

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[22] The Senate Report emphasized that this revised treatment of legal costs stands in contrast to the "more stringent rules applicable to standard procurement contracts," which typically prohibit the use of contract funds to pay legal fees and expect that such costs are built into the contract price. See Senate Report 35-36.

"based on a particular federal statute * * * that contains its own limitations period."

As this Court observed in *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), while there is a "general trust relationship between the United States and the Indian tribes," any specific obligations by the government are "governed by statute rather than the common law." *Id.* at 2318. ISDA and the CDA establish a clear procedure for the resolution of disputes over ISDA contracts, and an unambiguous six-year deadline for presentment of claims. The "general trust relationship" between the government and tribes does not override these unequivocal statutory requirements.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2015

## APPENDIX

1. 25 U.S.C. 450b provides in pertinent part:

**Definitions**

For purposes of this subchapter, the term—

* * * * *

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this sub-

chapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided[1] the last proviso in section 450j(a)[2] of this title, no contract (or grant or cooperative agreement utilized under section 450c-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

* * * * *

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[1] So in original. Probably should be "provided in"

[2] See References in Text note below.

2. 25 U.S.C. 450j provides in pertinent part:

**Contract or grant provisions and administration**

* * * * *

**(c) Term of self-determination contracts; annual renegotiation**

(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

**(d) Calendar year basis for contracts**

(1) Beginning in fiscal year 1990, upon the election of a tribal organization, the Secretary shall use the calendar year as the basis for any contracts or agreements under this subchapter, unless the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress

on the amounts of any additional obligation authority needed to implement this subsection in the next following fiscal year.

* * * * *

3. 25 U.S.C. 450j-1 provides in pertinent part:

**Contract funding and indirect costs**

**(a) Amount of funds provided**

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a

tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

* * * * *

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

**(c) Annual reports**

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

**(d) Treatment of shortfalls in indirect cost recoveries**

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full

amount of need for indirect costs associated with a self-determination contract.

* * * * *

**(g) Addition to contract of full amount contractor entitled; adjustment**

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

4. 25 U.S.C. 450*l*, provides in pertinent part:

**Contract or grant specifications**

**(a) Terms**

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

**(b) Payments; Federal records**

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of

such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposes of chapter 5 of Title 5.

**(c) Model agreement**

The model agreement referred to in subsection (a)(1) of this section reads as follows:

**"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.**

"(a) AUTHORITY AND PURPOSE.—

"(1) Authority.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self- Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following re-

lated functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

"(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) EFFECTIVE DATE.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified

in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

"(f) ATTACHMENTS.—

"(1) APPROVAL OF CONTRACT.—Unless previously furnished to the Secretary, the resolution of the _____ Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

"(2) ANNUAL FUNDING AGREEMENT.—

"(A) IN GENERAL.—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

5. 25 U.S.C. 450m-1 provides in pertinent part:

**Contract disputes and claims**

**(a) Civil actions; concurrent jurisdiction; relief**

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by

this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

* * * * *

**(c) Application of laws to administrative appeals**

The Equal Access to Justice Act (Public[1] Law 96-481, Act of October 1,[1] 1980; 92[1] Stat. 2325, as amended), section 504 of Title 5, and section 2412 of Title 28, shall apply to administrative appeals pending on or filed after October 5, 1988, by tribal organizations regarding self-determination contracts.

**(d) Application of chapter 71 of Title 41**

Chapter 71 of Title 41 shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

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[1] So in original. Probably should be "Public", "21,", and "94", respectively.

**(e) Application of subsection (d)**

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services[2] except that in any such cases finally disposed of before October 5, 1988, the thirty-day period referred to in section 504(a)(2) of title 5 shall be deemed to commence on October 5, 1988.

6. 28 U.S.C. 2412 provides in pertinent part:

**Costs and fees**

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

* * * * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in

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[2] See References in Text note below.

addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * * * *

7. 41 U.S.C. 7102 provides in pertinent part:

**Applicability of chapter**

(a) EXECUTIVE AGENCY CONTRACTS.—Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in

sections 1346 and 1491 of title 28) made by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair, or maintenance of real property; or

(4) the disposal of personal property.

* * * * *

8. 41 U.S.C. 7103 provides in pertinent part:

**Decision by contracting officer**

(a) CLAIMS GENERALLY.—

(1) SUBMISSION OF CONTRACTOR'S CLAIMS TO CONTRACTING OFFICER.—Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) CONTRACTOR'S CLAIMS IN WRITING.—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) CONTRACTING OFFICER TO DECIDE FEDERAL GOVERNMENT'S CLAIMS.—Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

(4) TIME FOR SUBMITTING CLAIMS.—

(A) IN GENERAL.—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) EXCEPTION.—Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(5) APPLICABILITY.—The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

(b) CERTIFICATION OF CLAIMS.—

(1) REQUIREMENT GENERALLY.—For claims of more than $100,000 made by a contractor, the contractor shall certify that—

(A) the claim is made in good faith;

(B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

(D) the certifier is authorized to certify the claim on behalf of the contractor.

* * * * *

(d) ISSUANCE OF DECISION.—The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) CONTENTS OF DECISION.—The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

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(g) FINALITY OF DECISION UNLESS APPEALED.—The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter. This chapter does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * * *

9. 41 U.S.C. 7104 provides in pertinent part:

**Contractor's right of appeal from decision by contracting officer**

(a) APPEAL TO AGENCY BOARD.—A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

(b) BRINGING AN ACTION DE NOVO IN FEDERAL COURT.—

(1) IN GENERAL.—Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

* * * * *

(3) TIME FOR FILING.—A contractor shall file any action under paragraph (1) * * * within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title.

(4) DE NOVO.—An action under paragraph (1) * * * shall proceed de novo in accordance with the rules of the appropriate court.

10. 41 U.S.C. 7105 provides in pertinent part:

**Agency boards**

* * * * *

(b) CIVILIAN BOARD.—

(1) ESTABLISHMENT.—There is established in the General Services Administration the Civilian Board of Contract Appeals.

* * * * *

(4) FUNCTIONS.—

(A) IN GENERAL.—The Civilian Board has jurisdiction as provided by subsection (e)(1)(B).

(B) ADDITIONAL JURISDICTION.—With the concurrence of the Federal agencies affected, the Civilian Board may assume—

(i) jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before January 6, 2007; and

(ii) any other function the agency board performed before January 6, 2007, on behalf of those agencies.

* * * * *

(e) JURISDICTION.—

(1) IN GENERAL.—

* * * * *

(B) CIVILIAN BOARD.—The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

* * * * *

(D) OTHER AGENCY BOARDS.—Each other agency board has jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency.

* * * * *

(g) DECISIONS.—An agency board shall—

(1) to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes;

(2) issue a decision in writing or take other appropriate action on each appeal submitted; and

(3) mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

10. 41 U.S.C. 7107 provides in pertinent part:

**Judicial review of agency board decisions**

(a) REVIEW.—

(1) IN GENERAL.—The decision of an agency board is final, except that—

(A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or

* * * * *

(b) FINALITY OF AGENCY BOARD DECISIONS ON QUESTIONS OF LAW AND FACT.—Notwithstanding any contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)—

(1) the decision of the agency board on a question of law is not final or conclusive; but

(2) the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is—

(A) fraudulent, arbitrary, or capricious;

(B) so grossly erroneous as to necessarily imply bad faith; or

(C) not supported by substantial evidence.

(c) REMAND.—In an appeal by a contractor or the Federal Government from the decision of an agency

board pursuant to subsection (a), the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.

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